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In the Supreme Court of the United States

.....Term, 1976

No. 76-302

DANIEL LEE GOINS and
WILLIAM EMANUAL ALLEN
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ of Certiorari to The United States Court of Appeals For The Third Circuit

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In the Supreme Court of the United States

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No.....

WILLIAM EMANUAL ALLEN and
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

William Emanuel Allen and Daniel Lee Goins, your Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on June 29, 1976, and the order denying the Petition for Rehearing dated July 28, 1976.

OPINIONS BELOW

The Opinion of the District Court denying the Motion for Suppression of Evidence is reprinted in Appendix A. The Opinion of the District Court Adjudging Defendants Guilty is reprinted in Appendix B. The Opinion of the District Court denying defendants' Motion for New Trial is reprinted in Appendix C. The Opinion of the United States Court of Appeals for the Third Circuit affirming the Judgment of the District Court is reprinted in Appendix D. The Order of the United States Court of Appeals for the Third Circuit denying Appellants' Petition for Rehearing is reprinted in Appendix E. The Order of the United States Court of Appeals for the Third Circuit Staying a Formal Mandate is reprinted in Appendix F.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit (Appendix E) was entered on June 29, 1976. A timely Petition for Rehearing was denied on July 28, 1976 (Appendix E). Pursuant to Rule 22 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within thirty (30) days after the entry of the Court of Appeals' final order.

Jurisdiction of this Honorable Court is invoked under 28 United States Code Section 1254(1).

QUESTIONS PRESENTED

Did the trial court err in ruling that the government could introduce into evidence physical evidence seized from the persons of the defendants at the IML Terminal Yard and in failing to grant defendants' Motion to Suppress that physical evidence, thereby denying appellants constitutional rights under the Fourth Amendment of the United States Constitution.

Did the trial court err in denying defendants' Motion for Judgment of Acquittal at the conclusion of the government's evidence, thereby denying appellants' rights to Due Process of Law under the Fifth Amendment of the United States Constitution.

Did the trial court err in adjudicating the defendants guilty where such adjudication was not supported by substantial evidence, thereby denying appellants' rights to Due Process of Law under the Fifth Amendment of the United States Constitution.

STATUTE INVOLVED

The statutory provisions involved are set forth in Appendix G hereto, *infra*.

STATEMENT OF THE CASE

This Petition is from the judgments of conviction and sentences arising from the convictions of appellants William Emanuel Allen and Daniel Lee Goins in the United States District Court for the Western District of Pennsylvania, after a non-jury trial before the Honorable William Knox. Appellants Allen and Goins were charged in a one count indictment with violation of Title 18 U.S.C. Section 2117. Both defendants were found guilty by the Honorable William Knox, sitting without a jury, on the charge contained in the indictment. Both defendants were sen-tenced to imprisonment for a term of three (3) years. These appeals follow.

Appellants filed motions to suppress physical evidence obtained from them after their arrest. The motions were denied on August 27, 1975, and trial commenced on October 20, 1975. Trial testimony consisted entirely of government witnesses.

REASONS FOR GRANTING THIS WRIT

1. Petitioners contend that the government denied their right to be free from unreasonable, warrantless arrests, searches and seizures as guaranteed by the Fourth Amendment to the United States Constitution. *U.S. v. Marlin*, 471 F.2d 764 (7th Circuit, 1972); *U.S. v. Lampkin*, 464 F.2d 1093 (3rd Circuit, 1972); *Wong Sun v. U.S.*, 371 U.S. 421, 83 S.Ct. 407, 9 L.Ed 2d 441 (1963); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed 2d 917 (1968); *U.S. v. Coates*, 495 A.2d 160 (D.C. Circuit 1974).

Petitioners argue that their warrantless arrest and subsequent search and seizure were accomplished by police officers without probable cause to believe that a felony, or any crime for that matter, had been committed; nor did the aforesaid police officers have probable cause to believe that petitioners were guilty of a specific felony, or any other crime.

2. Petitioners contend that the government denied them Due Process of Law as guaranteed by the Fifth Amendment to the Constitution of the United States, in the Trial Court's denying their Motion for Judgment of Acquittal at the conclusion of government's evidence.

Petitioners argue that the Trial Court arbitrarily created a "logical inference" from mere speculation, and the suspicion that appellants were guilty of something because they were in the area where a crime was discovered 1½ hours after their arrest and incarceration, and that they were running from or to something or someone. From the foregoing, the Trial Court inferred that appellants were "conscious of having a larcenous intent" (an element of the crime). But, see *U.S. v. Thomas*, 453 F.2d 141 (9th Circuit, 1971); *Bailey v. U.S.*, 416 F.2d 1110 (D.C. Circuit, 1969); *Hicks v. U.S.*, 150 U.S. 442.

3. Petitioners contend that the government denied them Due Process of Law as guaranteed by the Fifth Amendment to the Constitution of the United States, in that the Trial Court's adjudication of appellants' guilt was not supported by substantial evidence.

U.S. v. Tavauloris, 515 F.2d 1070 (2nd Circuit, 1975); *Leary v. U.S.*, 395 U.S. 636, 89 S.Ct. 1532, 1548, 23 L.Ed 2d 57 (1969).

The appellants argue the principle of *Tavauloris, supra*, is particularly applicable, in that a person guilty of some crime cannot be convicted of a particular crime unless there is proof beyond a reasonable doubt that he committed the particular crime.

The Court of Appeals rejected the above after oral argument, despite the fact that the government could only speculate as to why the appellants were subjected to a warrantless arrest and seizure, as the record of this case is silent as to why the appellants were arrested, other than the fact that their conduct aroused suspicion.

The questions presented are important to this Court because of the need to maintain uniformity between the Constitutional guarantees of the Fourth and Fifth Amendments to the Constitution of the United States as defined by this Court, and as interpreted and redefined by the various Circuit Courts of Appeals, resulting in the individual's Constitutional Rights being primarily dependent on geographics.

CONCLUSION

It is respectfully submitted that certiorari should be granted so that this Court can decide with finality the Constitutional questions raised above, and thereby insure uniformity of law as to the individual's rights under the Fourth and Fifth Amendments to the United States Constitution.

Respectfully Submitted,

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Attorneys for Petitioners

APPENDIX A

In The United States District Court for the Western District Of Pennsylvania

UNITED STATES OF AMERICA
v.
WILLIAM EMANUAL ALLEN
DANIEL LEE GOINS

Criminal Action No. 75-145

MEMORANDUM AND ORDER DENYING MOTION FOR SUPPRESSION OF EVIDENCE

The defendant William Emmanuel Allen moves the court to suppress evidence seized by him by the Neville Township Police Department on the night of April 26, 1975, when he was arrested immediately outside of the premises known as IML Terminal yard in Neville Township. Following his arrest the seals on five tractor trailers located in the yard which trailers contained interstate shipments were found broken and Allen together with his co-defendant Goins were charged with violation of 18 U.S.C. 2117. The motion is made only by Allen but at the hearing defendant Goins also joined in the same.

The evidence as taken at the suppression hearing shows that officer Ernest Gottlieb of the Neville Township Police on the evening of April 26, 1975, received a call over the radio to proceed to the terminal in question. Terry Graham, security officer at Leeway Terminal next door had told Gottlieb he had seen two persons inside the fence at the IML Terminal. The officer described how he went along the road with a walkie-talkie and saw two persons running from the IML Terminal Building and one crouched behind the fence and the other ran toward an adjacent railroad track. The defendant Allen jumped over a fence eight to ten feet high and he was then stopped by the officer who drew his gun, made him raise his hands then made him lie on the ground at

which time he was frisked and they seized from him a pair of pliers such as electricians used and gloves.

It appears the terminal was otherwise vacant and locked up for the night.

It is elementary that items seized in the course of a lawful arrest are properly evidence against the accused and when a police officer has lawfully placed the suspect under arrest for the purpose of taking him into custody, he may proceed to a full search of the prisoner, and this is true even where the arrest is for a traffic violation.

See Chimel v. California, 395 US 752, 23 L Ed 2d 685, 89 S Ct 2034 (1969); United States v. Robinson, 414 US 218, 38 L Ed 2d 427, 94 S Ct 467 (1973); Gustafson v. Florida, 414 US 260, 38 L Ed 2d 456, 94 S Ct 488 (1973) upholding a search in the course of a traffic arrest resulting in the discovery of marijuana cigarettes. In that case, the court said:

> "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial. Agnello v. United States, 269 US 20, 70 L Ed 145, 46 S Ct 4, 51 ALR 409 (1925); Abel v. United States, 362 US 217 [4 L Ed 2d 668, 80 S Ct 683] (1960). The standards traditionally governing a search incident to lawful arrest are not, therefore, commuted to the stricter Terry standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made." Ante, at 234, 38 L Ed 2d at 439, 440."

In Terry v. Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968) referred to in Gustafson, Chief Justice Warren said:

> "We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so."

The court held that search and seizure conducted by the Officer were reasonable both at their inception and as conducted since they reasonably concluded that petitioner was about to engage in an armed robbery in daylight.

The requirements for arrest for felony are simply those set forth in 5 Am Juris 2d, page 715 §25 where it is stated:

> "A peace officer may arrest without warrant for a felony committed or attempted in his presence. It is sufficient, as the rule is sometimes stated, if the officer has probable cause to believe that a felony is being committed in his presence. There is authority that an officer may also make an arrest without warrant *when he reasonably believes the person arrested is about to commit a felony, although such a belief will not justify him unless it is based on reasonable grounds.* A peace officer is usually authorized to arrest without warrant where he has reasonable cause to believe a felony has been committed and that the person to be arrested is the one who committed it.

In view of the conduct of the accused defendants being found in a locked trucking terminal at night, the officer could reasonably conclude that they were about to engage in a burglary or theft of contents of the building or cargoes of parked vehicles. The circumstances of jumping the fence and running made it impossible to secure an arrest warrant or a search warrant.

We therefore hold that the items taken from the person of the defendant were seized in the course of a lawful arrest

without warrant and may properly be received in evidence. The motion to suppress must be denied.

ORDER

AND NOW, to wit, August 27, 1975, upon consideration of the briefs and arguments of the parties and after full hearing of defendant's motion to suppress evidence.

IT IS ORDERED that the said motion be and the same hereby is denied.

/s/ WILLIAM W. KNOX
United States District Judge

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APPENDIX B

In The United States District Court
For The Western District Of Pennsylvania

UNITED STATES OF AMERICA v. WILLIAM EMANUEL ALLEN DANIEL LEE GOINS	**Criminal No. 75-145**

MEMORANDUM AND ORDER
ADJUDGING DEFENDANTS GUILTY

The defendants in this case stand charged with the breaking of seals upon certain semi-trailers parked in the freight yard of the IML Freight Terminal in Neville Township, Neville Island, Allegheny County, Pennsylvania, in violation of 18 U.S.C. 2117. The defendants both waived a jury trial and were tried by the court non-jury. IML is a trucking company transporting freight by motor vehicle in interstate commerce.

On the evening of Saturday, April 26, 1975, certain trailers were parked in the terminal yard loaded with cargo which had either been received from points outside the state or was destined to points outside the state. The evidence showed that their seals were intact when last inspected by the manager of the terminal about 1:30 p.m. At that time. another employee was still in the terminal which was later closed for the weekend. Later in the afternoon, another truck arrived. The gate, however, was found locked at approximately 9:30 p.m. when the Neville Township police arrived in response to a call from a security guard in an adjacent terminal. This gate, the only access to the property, was located at the northwest corner. Another walk-through gate in the west fence was kept locked.

The adjacent terminal was that of the Leeway Trucking Company which had a security guard posted. The IML Terminal had been closed at approximately 2:00 p.m. on this Saturday, not to be re-opened until the lock on the gate entering the yard and, as noted, the gate had been closed and re-locked being found in this condition when the police arrived and also when Lynn, the manager, arrived at 10:30 p.m. It was stipulated that the shipments constituting the lading of these trailers were moving in interstate commerce.

While the company generally maintained a security guard at this terminal twenty four hours a day, nevertheless this guard had been cancelled for a period of sixty days as an economy measure which period included the date of Saturday, April 26.

The seals on the trailer were found removed at approximately 10:00 p.m. having been pried open but not cut. The trailers in question were parked in the yard along the west fence. Some of the merchandise from one of the trailers was found on the ground beside the same at a later time in the evening, boxes of the lading having been opened. The yard was illuminated with flood lights.

Robert C. Adams, Jr. night supervisor at the IML Terminal in charge on Saturdays had left the yard at approximately 1:30 p.m. He testified he was responsible for closing the same and at approximately 12:45 p.m., he had examined the trailers in question except the one which arrived later from Sacramento, California and found the seals intact and that there was no merchandise on the ground. He stated that usually the seals were cut by the use of pliers but that they also could be pried off with a bar or twisted by hand. He also testified that he had shut and locked the gate when he left and did not return until 6:00 a.m. the following Monday.

Terry Graham, the security guard at Leeway Terminal adjoining that of ICM, said that at approximately 9:00 p.m. on April 26, when both terminals were closed, he was punching his clock along the fence adjacent to the IML Terminal when he saw the figures walk across to the trailers in the IML yard parked near the west fence. They would be walking east to west. Since there were no cars parked in the IML yard indicating that workers were not present, he became suspicious and five minutes later called the Neville Township Police. He said he was fifty of sixty yards from the figures whom he saw moving in and out among the trailer. He saw the figures again after he called the police. The police came in five minutes to the gate of the ICM Terminal adjacent to Leeway and then checked the property. Graham said the call to the police went in around 9:15 to 9:20 p.m. He was unable to identify the figures as the defendants. They wore dark clothes.

Ernest Gottlieb, a police officer from the Neville Township Police Force with 28 years experience, told about receiving the call from Mr. Graham and going to the ICM Terminal. He was in a police car to the main gate which he found locked and then drove along the west fence of the terminal and then along the south fence. He saw two people running towards a shanty near the east fence. The area was brightly lighted as he passed the area of the trailers. He observed nothing amiss. When he arrived at the southeast corner of the premises, he observed two people running from the terminal building in the center of the property to a shanty where they hid. He crouched behind a crane. One defendant later identified as Allen jumped the fence while defendant Goins was running inside the fence. Allen having jumped the fence was immediately apprehended and made to lie down when the wire cutters or pliers and gloves which are in evidence were taken from him. Only gloves were found on Goins when arrested. It was cool but no one else

was wearing gloves. Neither defendant was carrying anything.

Meanwhile, Officer Allen had gone around to the east of the terminal and approached it from the south and assisted in the proceedings. Both defendants were wearing dark clothing. A pistol shot was heard which was later identified as being fired by Officer Allen.

The court had previously, in a motion to suppress, considered the legality of the search of defendant Allen and ruled that it was legal as made in the course of a lawful arrest. The court has therefore refused to suppress the evidence. Reference is made to the memorandum filed in connection with that motion for further reference to this legal question. The defendants were advised of their rights and taken to the police station where they were again searched. Officer Allen departed to return to the terminal. The fence which defendant Allen jumped was eight feet high but in poor condition. The officers observed no one else in the terminal yard.

Officer Allen confirmed what Officer Gottlieb had testified to and said that he had called to the defendant to halt and then fired a shot in the air. Officer Allen later returned to the terminal in the company of Chief Seltzer where they found heavy wire cutting pliers and a large lantern flashlight underneath the fence where the defendants were apprehended. He searched the area near the trailers, found the trailer doors were broken open and the open carton beside the trailer with merchandise exposed. The area it appears was well lighted by flood lights. Chief Seltzer corroborated Officer Allen with respect to what was found when they returned to ther terminal after the arrests.

The statute with which we are dealing reads as follows:

> "Whoever *breaks the seal* or lock of any railroad car, vessel, aircraft, *motortruck*, wagon or *other vehicle* or of any pipeline system, *containing interstate or foreign shipments* of freight or express or other property, or enters any such vehicle or pipeline system with intent in either case to commit larceny therein, shall be fined not more than $5,000 or imprisoned not more than ten years, or both." 18 U.S.C. 2117.

It is noted that the following elements must be shown: First, that the seals on the vehicles were broken; second, the vehicles contained cargoes moving in interstate commerce; and third, that the same were broken with a larcenous intent.

The court is disregarding the evidence as to finding of the heavy cutters and lantern upon the ground afterwards since they cannot be connected definitely with any person. Further, the evidence of the wire cutters and gloves found in defendant Allen's possession is of only slight evidentiary value since the night was chilly. While the officers were not wearing gloves, any person might reasonably be expected to wear gloves on the night in question.

The court has been concerned about the ability of the defendants to carry away goods from a fully-laden truck or semi-trailer. Ordinarily, such thefts are accomplished by stealing the entire trailer itself with its contents or by bringing up other trucks and/or semi-trailers and/or other vehicles and transferring the lading into these for the purpose of removal. There is no evidence of any such vehicles or equipment being present. However, the larcenous intent need only exist as to one or more of the small packages in the lading, and the mere fact that defendants were apparently unable to carry away the whole trailer load does not prevent the finding of larcenous intent. Such intent may be inferred also from defendants' stealthy conduct.

The court has further been impressed by the flight of these defendants as showing consciousness of guilt. Both were running and one jumped an eight-foot high fence. It

strains credulity to the breaking point to determine that such actions did not indicate consciousness of guilt. The police cars had come up the gate, one at least with lights on and their very presence coupled with the driving around two sides of the terminal by one of the cars was sufficient to cause persons in the terminal engaged in breaking into trailers to run. In Sibron v. New York, 39, US 40, 20 L Ed 2d 917, 88 S Ct 1889 (1968) (an arrest case) the court said:

> "As the trial court explicitly recognized, deliberately furtive actions and flight at the approach of strangers or law officers are stong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest."

The fact that Officer Gottlieb saw nothing amiss when he passed the trailers in his swing faround [sic] the yard is not of particular moment since he was in a car and was only looking for prowlers in the yard and would not necessarily be looking for a broken seal on a trailer or a carton lying beside the same.

There is evidence that the trailer seals were intact in the early afternoon of Saturday, April 26, and once such a situation has been shown to exist, it will be presumed that it continued at least until something to the contrary is shown which in this case did not appear until late that evening when the seals were found broken. It is noted that the seals were not cut but had been pried off by a bar or some other object. For this reason, the court is paying little attention to the fact that pliers were found in the possession of the defendant Allen except that this is some evidence of larcenous intent and wilfulness.

The court is aware that it must find the defendants guilty beyond a reasonable doubt. The defendants did not

take the stand and testify in their own defense. The court, however, is basing no conclusion on this and is giving them the benefit of the preumption [sic] of innocence and is giving them the benefit of every reasonable doubt. Nevertheless in view of their stealthy conduct and flight and the other circumstances of the case the court finds them guilty beyond a reasonable doubt. The court further finds that the acts in question were done wilfully and intentionally.

While specific findings under Rule 23(c) were waived, nevertheless the foregoing memorandum contains the findings of fact specified in the rule.

ORDER

AND NOW, TO WIT, November 5, 1975, for reasons set forth in the foregoing memorandum,

IT IS ORDERED that the defendants William Emanuel Allen and Daniel Lee Goins be and they hereby are determined to be guilty of the offense of breaking the seals of vehicles carrying shipments in interstate commerce with a larcenous intent in violation of 18 U.S.C. 2117.

IT IS FURTHER ORDERED that presentence reports be prepared.

IT IS FURTHER ORDERED that defendants appear for sentence on *December 4, 1975, at 9:15 a.m.*

/s/ WILLIAM W. KNOX
United States District Judge

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APPENDIX C

In The United States District Court
For The Western District Of Pennsylvania

UNITED STATES OF AMERICA

vs.

WILLIAM EMANUEL ALLEN and
DANIEL LEE GOINS

Criminal No. 75-145

MEMORANDUM AND ORDER DENYING MOTIONS FOR NEW TRIAL

The defendants in this case were determined on November 5, 1975, to be guilty of the offense of breaking the seals of vehicles carrying shipments in interstate commerce with larcenous intent in violation of 18 USC 2117. On November 12, 1975, the defendants filed motions for new trial alleging numerous grounds on which argument has been held and further briefs filed.

Many of the grounds alleged for new trial have already been covered in the Memorandum filed by the Court in support of its adjudication of November 5, 1975, and no useful purpose would be served by repeating them in this Memorandum. The parties at the conclusion of the trial had waived finding of the facts specially under Rule 23(c), but the Court nevertheless considered that an explanation of the reasons for the determination should be filed. We will deal with the reasons advanced in the motions as follows:

Reasons 1, 2, 3, 4 and 6 are general grounds complaining that the verdict is contrary to the weight of the evidence, is not supported by substantial evidence, that it is contrary to law, and that the Court erred in denying defendants motions for judgment of acquittal. These grounds are overruled for reasons stated in the original memorandum adjudging the defendants guilty.

In paragraph 5 of the motions for new trial complaint is made that the Court's verdict is based on conjecture and speculation, and that the Court made arbitrary and capricious inferences from the evidence.

This was all covered in the original memorandum adjudging the defendants guilty, however, the Court would also point out as argued by the Government in its brief that only approximately two minutes elapsed from the time that certain persons were observed in the vicinity of the trailers, whose seals were broken, by Security Guard Graham in the adjacent trucking terminal, until the police arrived and only a short time later these defendants were observed moving from the terminal to a shed on the other side of the property from which thereafter one of the defendants ran and the other vaulted an eight foot fence and was secured by the policeman nearby. Under these circumstances the Court holds there is legitimate inference that these were the persons observed near the trailers and showed their consciousness of guilt by acting in a furtive manner and attempting to escape.

In paragraphs 7 and 11 in the motions for new trial complaint is made that certain articles were taken from one of defendants as a result of an illegal search and seizure. This matter was already fully covered by the Court in its memorandum and order dated August 27, 1975, denying motion to suppress which is also incorporated herein by reference wherein it was held that these articles were taken from the defendant Allen who had jumped over the fence in the course of making a lawful arrest and that the seizure was proper under Terry v. Ohio 392 US 1 (1968) and Gustafson v. Florida 414 US 260 (1973). In any event on page 5 of the memorandum adjudging the defendants guilty the Court indicated that these matters were of slight evidentiary value. In arriving at this conclusion the Court particularly held that

the gloves were not incriminating since anyone could be wearing them on the night in question. It also appeared that the pliers had not been used for the purpose of breaking the seals which had been pried off by use of a bar or twisted by hand, but nevertheless pliers would be the logical implements to have in possession to break seals on trailers.

In paragraph 8 of the motions the defendants raised a novel question that they were not present at the time the "verdict" in this case was returned and therefore are entitled to a new trial for violation of Rule 43(a) which states that "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the empanelling of the jury and the *return of the verdict* and at the imposition of the sentence except as otherwise provided by this rule."

Research of Court and counsel has failed to indicate any other case in which this matter has been raised. It has been customary in this court in case of a non jury trial to file the memorandum or findings of fact or criminal finding of guilt sometime after the trial has concluded after the court has had an opportunity to reflect upon the matter, examine the authorities cited on both sides, and marshal the reasons for or against a finding of guilt. This document is then filed in the Clerk's Office, copies mailed to counsel and the defendant is directed to appear for sentence.

This Court holds that Rule 43(a) only pertains to the presence of the defendant at the rendition of a verdict by the jury and that the word verdict has no reference at all and has no meaning when used with respect to entering a finding of guilt by a judge sitting without a jury.

The purposes of the defendant's presence at the rendition of a verdict are obviously for him to be present if a poll is conducted if requested and also for the purpose of

having the jury come face to face with the defendant at the rendition of the verdict. This is provided under Rule 31(d). In Rule 31(a) it is provided that the verdict shall be unanimous and shall be returned to the judge by the jury in open court. If the word verdict means findings by the court in a non jury trial then the word verdict in these other rules would render it meaningless. The word verdict in its commonly accepted usage means the answer of the jury concerning any matter of fact in a cause committed to them. See 92 Corpus Juris Secundum Page 996.

Regardless of this the complaint can easily be remedied by reading the order determining the guilt of the defendants at the time of sentence to them and this will be done in this case.

It is the conclusion of the Court that questions of this nature do not constitute substantial error. If the presence of the defendant is required at the rendition of the judge's finding in a non jury trial then the Court holds that no prejudice has occurred in this case.

The question to be determined is whether the failure of the defendant to be present at a given moment is shown to be prejudicial or is mere harmless error. Walker v. U.S. 322 F 2d 434 (D. C. Cir 1963), U.S. v. Schor 418 F 2d 26 (2d Cir 1969). We will therefore deny this ground containe din the motions for new trial.

Defendants' ninth reason for new trial is that they were convicted on prely circumstantial evidence. They claim that this is not proper and cite Ezzard v. U.S. 7 F 2d 808 (8th Cir 1972) as authority for this proposition.

The most that can be said about Ezzard is that it has never been the law in this Circuit. The rule about circumstantial evidence is stated in Section 11.02 of Devitt and Blackmar's Federal Jury Instructions as follows:

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence—such as the testimony of an eyewitness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

As far as the Third Circuit is concerned the law relative to circumstantial evidence is summed up in U.S. v. Hamilton 457 F 2d 95 (3d Cir 1972) as follows:

The record discloses that the evidence provided sufficient basis for the jury's conclusion that the checks exhibited at trial had been taken from the Credit Union by larceny. "Evidence need not be inconsistent with every conclusion save that of guilt, provided it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt." United States v. Giuliano, 263 F 2d 582, 584 (3d Cir 1959), United States v. Boyle, 402 F 2d 757 (3d Cir 1968) cert. denied 394 U.S. 934, 89 S Ct 1207, 22 L Ed 2d 464 (1969). The circumstantial nature of the evidence does not alter this conclusion. United States v. Boyle, supra. Theft, like most other facts, can be proven circumstantially. United States v. Allegrucci, 258 F 2d 70, 76 (3d Cir 1958). Since circumstantial and testimonial evidence are indistinguishable insofar as the jury's fact-finding function is concerned, all that is to be required of the jury is that it weigh all of the evidence, direct or circumstantial, against the standard of reasonable doubt. Holland v. United States, 348 US 121, 75 S Ct 127, 99 L Ed 150 (1954).

For these reasons the motions based upon paragraph 9 will be refused.

In paragraph 10 of the motions for new trial it is contended that the Court's memorandum of November 5, 1975 states that the defendants' failure to take the stand created a negative inference against him.

Such is not the case. On page 7 in the next to the last paragraph, the Court stated as follows:

> "The Court is aware that it must find the defendants guilty beyond a reasonable doubt. The defendants did not take the stand and testify in their own defense. The Court, however, is basing no conclusion on this and is giving them the benefit of the presumption of innocence and is giving them the benefit of every reasonable doubt. Nevertheless in view of their stealthy conduct and flight and the other circumstances of the case the Court finds them guilty beyond a reasonable doubt. The Court further finds that the acts in question were done wilfully and intentionally."

The Court could properly consider the furtive conduct of the defendants and their flight as giving rise to an inference of consciousness of guilt which inference was considered along with the other evidence in the case and in view of all the circumstances it was determined by the Court that their guilt was proved beyond a reasonable doubt.

The Court considered this evidence in the same light that a jury would be instructed to consider the same as set forth in 11.18 of Devitt and Blackmar's Federal Jury Instructions as follows:

> The intentional flight or concealment of a defendant immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence. Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

In page 6 of the memorandum reference was made to the flight and the jumping of an eight foot fence and the Court said, "It strains credulity to the breaking point to determine that such actions did not indicate consciousness of guilty." It was pointed out that police cars were in view and their presence was sufficient to cause persons in the terminal engaged in breaking into trailers to run.

This is only an inference permissively to be drawn from flight and does not raise any presumption of guilt and the Court has not treated it as such. This is in the same category as an inference to be drawn from the possession of recently stolen property dealt with by the U.S. Supreme Court in Barnes v. U.S. 412 US 837, 37 L. Ed. 2d. 380, 93 S Ct 2357 (1973) wherein it was held that a drawing of a permissible inference which was not binding on the jury or upon the Court did not violate the defendant's right against self incrimination. If there was other evidence to explain their presence upon the premises, the defendants could have offered it without taking the stand in violation of their rights against self incrimination.

Defendants rely upon Bailey v. U.S. 416 F 2d 1110 (D.C. Cir 1969) in supporting their position that there was insufficient evidence derived from the inferences in the case.

We are not bound by the decisions of the D.C. Circuit and do not find this case persuasive, but in any event there were many other circumstances in this case pointing to the

guilt of the defendants beyond inference to be drawn from flight as evidence of consciousness of guilt.

For these reasons the motions for new trial are refused.

ORDER

AND NOW, to wit, January 8, 1976, for reasons set forth in the foregoing memorandum the defendants' motions for new trial are refused and defendants are directed to appear for sentence on Friday, January 16, 1976 at 9:15 a.m.

/s/ WILLIAM W. KNOX
United States District Judge

CC: David B. Atkins, Esq.
Asst. United States Attorney

Richard C. DeRenzo, Esq.
1308 Frick Bldg., Pgh 15219

D. Stephen Ferito, Esq.
1308 Frick Bldg., Pgh 15219

APPENDIX D

United States Court of Appeals
For The Third Circuit

Nos. 76-1094 and 76-1136

UNITED STATES OF AMERICA

v.

WILLIAM EMANUEL ALLEN
DANIEL LEE GOINS

Daniel Lee Goins, appellant in No. 76-1094
William Emanuel Allen, appellant in No. 76-1136

On Appeal from the Ucited States District Court
for the Western District of Pennsylvania
Crim. No. 75-145

Argued June 22, 1976

Before: ADAMS, HUNTER and WEIS, *Circuit Judges*.

JUDGMENT ORDER

After considering the contentions raised by appellants, namely, that the court erred: (1) in ruling that the government could introduce into evidence physical evidence seized from the persons of the appellants at the IML terminal yard and in failing to grant the appellants'

motion to suppress that evidence; (2) in denying appellants' motion for judgment of acquittal at the conclusion of the government's evidence; (3) in adjudicating the appellants guilty where such adjudication was not supported by substantial evidence; and (4) in not granting appellants' motion that the trial judge disqualify himself from further participation in the case after the United States Attorney made the trial judge aware of certain facts that were not in evidence but were extremely prejudicial to the appellants; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ARLIN M. ADAMS
Circuit Judge

ATTEST:

THOMAS F. QUINN
Thomas F. Quinn
Clerk

Dated: June 29 1976

APPENDIX E

United States Court of Appeals For The Third Circuit

Nos. 76-1094 & 76-1136

UNITED STATES OF AMERICA

v.

WILLIAM EMANUEL ALLEN, appellant in 76-1136
DANIEL LEE GOINS, appellant in 76-1094

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: July 28, 1976

APPENDIX F

United States Court of Appeals
For The Third Circuit

Nos. 76-1094 and 76-1136

UNITED STATES OF AMERICA

vs.

WILLIAM EMANUEL ALLEN,
DANIEL LEE GOINS,

Appellants

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 27, 1976.

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: August 6, 1976

APPENDIX G

STATUTE INVOLVED

"Whoever ***breaks the seal*** or lock of any railroad car, vessel, aircraft, ***motortruck***, wagon or other vehicle or of any pipeline system, containing interstate or foreign shipments of freight or express or other property, or enters any such vehicle or pipeline system ***with intent in either case to commit larceny*** therein, shall be fined not more than $5,000 or imprisoned not more than ten years, or both." 18 U.S.C. 2117.

FILED
NOV 16 1976
MICHAEL RODAK, JR., CLERK

No. 76-302

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM EMANUEL ALLEN and DANIEL LEE GOINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of affirmance of the court of appeals (Pet. App. D) is reported at 538 F. 2d 320. The memoranda of the district court denying the motion to suppress (Pet. App. A), adjudging petitioners guilty (Pet. App. B), and denying motions for a new trial (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1976, and a petition for rehearing (Pet. App. E) was denied on July 28, 1976. The petition for a writ of certiorari was filed on August 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search of petitioners was incident to a lawful arrest.

2. Whether the evidence was sufficient to support the convictions.

STATEMENT

After a non-jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of breaking seals on vehicles carrying interstate shipments, with intent to commit larceny, in violation of 18 U.S.C. 2117. Each was sentenced to three years' imprisonment. The court of appeals affirmed without opinion (Pet. App. D).

The evidence at trial showed that on April 26, 1975, trailers containing interstate shipments were parked at the IML Freight Terminal at Neville Island, Pennsylvania (Tr. 12). At about 9:00 p.m. on that day, a security guard at a nearby freight terminal observed petitioners walking between and under the trailers in the IML terminal (Tr. 87). The security guard became suspicious and notified the local police (Tr. 87-88).

Two police officers arrived at about 9:30 p.m. (Tr. 99). One officer checked the IML front gate, found it locked,[1] and began walking around the fence surrounding the terminal yard. As he did so, petitioners ran from the terminal building toward a shanty (Tr. 100) and then attempted to flee the terminal grounds (Tr. 100-101, 137-138). Petitioners were eventually overtaken, subdued, and arrested by the officers (Tr. 101-102, 138). A search of petitioners uncovered wire cutters or pliers in petitioner Allen's pocket (Tr. 103, 139).[2]

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[1]Other gates to the facility were also locked (Tr. 46).

[2]Petitioners were each wearing gloves when they were arrested (Tr. 103, 139, 142). Although the gloves were seized and introduced at trial (Tr. 139, 142), the district court found them to be "of only slight evidentiary value since the night was chilly" (Pet. App. 9a).

The freight yard was also searched shortly after petitioners' arrest (Tr. 21, 144; Pet. App. 6a). Although the seals on three of the trailers had been inspected and found intact earlier in the day, and a fourth sealed trailer had arrived from Cincinnati, Ohio, late that afternoon (Tr. 32-34), the seals on all four trailers containing interstate shipments were found pried open at approximately 10:00 p.m. (Tr. 21, 66). Furthermore, doors on the trailers had been opened and some of the freight had been removed and placed on the ground (Tr. 20-21, 147; Pet. App. 6a).

ARGUMENT

1. Petitioners contend (Pet. 4) that they were arrested without probable cause and that the searches incident to their arrests were therefore illegal. This claim is insubstantial. Petitioners were observed at night in a locked freight yard under suspicious conditions. When the officers approached, petitioners first attempted to conceal themselves and then tried to escape. While fleeing, they ignored both an order to halt and a warning shot (Tr. 138). See *Sibron* v. *New York*, 392 U.S. 40, 66.[3] In these circumstances, the officers had probable cause to believe that petitioners were engaged in criminal activity. See *United States ex rel. Frasier* v. *Henderson*, 464 F. 2d 260, 262-263 (C.A. 2); *United States ex rel. Richardson* v. *Rundle*, 461 F. 2d 860, 863-864 (C.A. 3), certiorari denied, 410 U.S. 911; *Hinton* v. *United States*, 424 F. 2d 876, 879-880 (C.A. D.C.).[4] Accordingly, the searches made incident to these arrests were legal. *United States* v. *Robinson*, 414 U.S. 218, 224.

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[3]*Wong Sun* v. *United States*, 371 U.S. 471, cited by petitioners, held that, in the circumstances of that case, a defendant's flight did not signify guilty knowledge because it may have resulted from "a natural desire to repel an apparently unauthorized intrusion" (*id.* at 483). No comparable explanation for petitioners' flight is present here.

[4]Contrary to petitioners' suggestion (Pet. 4), knowledge of the precise crime in which a suspect is engaged is not required in order to justify an arrest. *United States ex rel. Frasier* v. *Henderson*, *supra*.

2. Petitioners claim (Pet. 4-5) that the evidence was insufficient to support their convictions. Viewed in the light most favorable to the government, however, the evidence outlined above unquestionably justified the trial court's findings. Moreover, the court properly considered petitioners' concealment and flight as evidence of consciousness of guilt. Petitioners' actions, which were triggered by the arrival of police officers, were highly probative, especially since petitioners had fled in the face of an order to halt and a warning shot.[5]

United States v. *Tavoularis*, 515 F. 2d 1070 (C.A. 2), does not support petitioners' arguments. There, although the defendants had been convicted of possession of Treasury bills, knowing them to have been stolen from a bank, the evidence showed only that the defendants had possessed the bills with knowledge that they had been stolen. The court of appeals reversed the convictions on the ground that the evidence did not support the inference that the defendants knew the property had been stolen from a bank, proof of which was required by statute. By

[5] *Bailey* v. *United States*, 416 F. 2d 1110 (C.A. D.C.), is distinguishable. Although the evidence in that case showed that the defendant was present at the scene of a robbery, that he had a slight association with the robber, and that he had fled after the robbery, the proof was insufficient to show that defendant had associated himself with or promoted the robbery. By contrast, petitioners' concealment and flight, coupled with their presence at the trailers where the seals were broken and their possession of tools suitable for breaking the seals, indicated that they had broken the seals. Unlike *Bailey*, petitioners' actions here, apart from their flight, were not innocuous.

Similarly, *United States* v. *Thomas*, 453 F. 2d 141 (C.A. 9), certiorari denied *sub nom. Lucas* v. *United States*, 405 U.S. 1069, is inapposite. In *Thomas*, the court held that the mere presence of marihuana in an automobile was insufficient to establish the guilt of a passenger for transporting the contraband. The facts here show substantially more than mere presence at the scene of the crime.

contrast, petitioners were shown to have been at the scene of the crime, to have possessed a tool useful in breaking into sealed trailers, and to have attempted concealment and flight upon the appearance of police officers. Moreover, the seals, which had been intact before petitioners' arrival at the yard, were found broken after their arrests. The compelling inference is that petitioners broke the seals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
JAMES A. HUNOLT,
Attorneys.

NOVEMBER 1976.

DOJ-1976-11